IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21878

BRUCE EUGENE BOSWELL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

J. B. TIETZ
MICHAEL HANNON
410 Douglas Building
257 South Spring Street
Los Angeles, California, 90012
Attorneys for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Southern District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years for one count of violation of Section 50 U.S.C. App. 462; Universal Military

Training and Service Act; Refusal to be inducted [CT 28].[1] Title 18, Section 3231, United States Code, conferred jurisdiction in the District Court over the prosecution of this case. This court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law [CT 29].

STATEMENT OF THE CASE

The indictment charged the appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction.

Appellant pleaded not guilty and was tried by Judge Jesse W. Curtis, sitting alone, without a jury. Appellant was found guilty and sentenced, as shown in the Clerk's Transcript of Record on file herein.

A written motion for Judgment of Acquittal had been filed during the trial [CT 23].

THE FACTS

Appellant registered with Local Board No. 134, Santa Ana, California and was given number 4-134-43-704.

He was classified in Class I-A, meaning available for military service.

He was ordered to report for induction. Before the date set for his induction he went to the office of the local board and asked the clerk for the Special Form for Conscientious Objector (SSS Form No. 150). She refused to give it to him.

Appellant then wrote a brief letter to the local board stating he would not submit to induction and, subsequently, on March 16, 1966, refused to submit to induction [Ex. 66].

1. CT refers to the Transcript of Record.

QUESTIONS PRESENTED AND HOW RAISED

I

Was appellant denied due process by the refusal of the board employee to give him the opportunity to formally submit a claim for a conscientious objector classification? This was raised by the Motion for Judgment of Acquittal.

II

Was appellant denied a classification without a basis in fact? This also was raised by the Motion.

SPECIFICATION OF ERRORS

I

The district court erred in failing to grant the motion for judgment of acquittal.

II

The district court erred in convicting the defendant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

1. Appellant was entitled to have the Special Form and to file it.
2. He was entitled to claim a conscientious objector classification.
3. The filing of a prima facie claim for a classification "lower" than one currently held requires a reopening.
4. He was prejudiced by the arbitrary action of the clerk.

Dickinson v. *United States,* 74 S. Ct. 152 (1953).

Brown v. *United States,* 9 Cir., 1954, 216 F. 2d 258.

Gearey v. *United States,* 2 Cir., 1966, 368 F. 2d 144.

> later submitted. . . . Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claims considered and acted upon by these local bodies. . . .
>
> "But, it is suggested, a presumption of regularity or due performance of duty attends official action; and it should be presumed in this instance not only that the local board considered the claims of the registrant but that in light of them it took action to continue in effect his original I-A classification. We think the court may not indulge the presumption, at least in the latter respect, in the condition of the record in the case."

Thus the local board did not make the essential finding that Boswell's beliefs had matured at some time other than the period between the Notice to Report for Induction and the induction date. Absent such a finding, *Gearey* holds that he would be "entitled" to reopening (368 F.2d 144, 150). We submit that the *Gearey* decision is sound and should be followed.

If *Gearey* is not applied to the set of facts present here the courts will be creating an anomalous situation. A man whose conscientious objections crystallize (1) before the Order to Report for Induction or (2) after induction actually takes place, may, as Congress intended, serve his country in other than a military capacity. The Selective Service System aids him in the first instance. In the second instance the various military services have provided procedures for investigating claims of conscientious objection arising after induction and, in appropriate cases, granting honorable discharge. See: Department of Defense Directive No. 1300.6 ASD(M) (August 21, 1962); Army Regulation No. 635-20 (5 January, 1966); Department of Navy, Bupers Instruction 1616.6 (November 15, 1962); Marine Corps Order 1306.16A (October 16, 1962); Air Force Regulation No. 35-24 (March 8, 1963). Each of these pro-

vides that the belief must not have existed prior to induction on the grounds that, had it been, it would have been properly investigated by the Selective Service System.

The gap that would be created by rejection of the holding in *Gearey* would fly in the face of the Congressional policy shown by the language of Section 6 (j) of the Universal Military Training and Service Act that "*Nothing* in this title . . . shall be construed to require *any* person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . ." (Emphasis supplied).

As early as 1945, the courts have expressed disapproval of such a gap in the scheme of classification. In *U. S. ex rel. Hull* v. *Stalter,* (7th Cir., 1945) 151 F.2d 633, 635, the court said:

> We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by § 5 (h) of the Act, which provides that "no * * * exemption or deferment * * * shall continue after the cause therefor ceases to exist". The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be en-

deprived him of his right of personal appearance before the board and of his right to an administrative appeal, and hence of due process, in consequence of which the order for his induction is invalid."

II

There Was No Basis in Fact for Rejecting the Appellant's Conscientious Objection Classification Claims.

The appellant finally "crystallized" his conscientious objections on or about March 15, 1967, by the order to Report for Induction.

The board took no evidence from appellant subsequent to that time as it did not even interview him. There is no indication in the file that the board had any other evidence from any source, or tried to get any as to the sincerity of appellant's belief or the validity of his claims. See *Dickinson* v. *U. S.*, 74 S. Ct. 152, at 157, where the High Court partially cataloged the many means by which the boards could test the truthfulness of a registrant's claims, and page 158 where it denounced "dismissal of the claim solely on the basis of suspicion and speculation."

Information from prior to that date should be no more relied upon to dispute appellant's present sincerity than should the persecutions he participated in prior to the incident on the Damascus road be used to discredit St. Paul's standing as a Christian.

Thus, although the local board could easily have gathered evidence upon which to evaluate appellant's claim, they did not do so but instead arbitrarily rejected those claims without even so much as talking to him.

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal.

Respectfully submitted,

J. B. Tietz and
Michael Hannon
Attorneys for Appellant

September 15, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. Tietz and
Michael Hannon
Attorneys for Appellant